

ADVICE NOTE

Presented to	July 2022 Ordinary Council Meeting
Related to Item	UP22/3994
Submitted by	Acting Manager Statutory Planning
Attachments	<u>Four Step Assessment – 4 Fraser Road, Applecross</u>

At the June 2022 Ordinary Council Meeting, in consideration of Late Item UP22/3988, an application for a proposed two storey single house with roof terrace, Council resolved to defer the item to the July Ordinary Council Meeting and that legal advice be obtained in part in relation to whether views of significance are material considerations in respect to the subject DA.

The legal advice obtained was circulated to Elected Members in the EMB on 15 July 2022.

In summary the legal advice is that the relevance of impact of a proposed development on views is not confined to the impact on views of adjoining properties and extends to the impact on views of nearby properties.

Where a development application is required to be assessed under the design principles of the R Codes in relation to building height, views from properties other than adjoining properties can be relevant.

The legal advice refers to a SAT case [2019] WASAT 88 Warden which contains a detailed approach as to how to apply the design principles relating to building height in so far as it requires assessment of impact on views.

The development application for three storey single house with roof terrace at 4 Fraser Road seeks assessment under the R Codes design principle 5.1.6 for building height and LPP 1.9. It is noted that the report at Item UP22/3994 includes assessment of the impact of the proposed development on the views of nearby properties considered to be most affected.

This Advice Notes provides further comment on the assessment of the impact of the proposed development on views of significance by reference to the approach outlined by SAT in the Warden case so as to demonstrate that these matters have been properly considered. A copy of this assessment is attached.

Consequences

The assessment of the proposed development at 4 Fraser Road, Applecross having regard to the Warden cases indicates that the development has appropriate regard to access to views of significance for surrounding neighbours. As such the officer recommendation in this matter remains unchanged.

At the ABF on 12 July 2022 a number of questions regarding the development at 4 Fraser Road were taken on notice. Those questions and the answers provided to Elected Members in the EMB on 15 July are summarised below:

Clarification on the comment that the rear of the property will be approximately 14metres above natural ground level which is not permitted under the R-Codes in a R12.5 zone.

Under LPP1.9 'Height of Buildings' and Clause 5.1.6 'Building Height' of the R-Codes, the maximum building height permitted for an R12.5 zoned site is 10.5m at the top of the highest element of the building measured from natural ground level. An application that does exceed the 10.5m maximum building height above natural ground level requires an assessment against the Design Principles of the R-Codes, as is contained within the Council Report for this item under Building Height within the comments section.

The maximum height proposed by the development is 12.3m directly above natural ground level. This occurs at the top of the balustrading of the roof terrace in lieu of the maximum height permitted of 10.5m as per LPP1.9 – Building Height. The maximum height at the rear of the proposed development is 11.9m directly above natural ground level.

Advice with regard to at what point in the fall of the block the 10.5m roof height is achieved and whether the roof top space continued back from that point – is there a point at which the roof top terrace continues at a height it would not ordinarily be permitted to continue if it followed the natural ground contour.

The height of roof terrace (including its balustrading) is above 10.5m in height directly above natural ground level for its entire length. The height of the roof terrace (including balustrading) ranges from 10.8m to 12.3m directly above natural ground level.

Are there any on-site trees on the property?

This question was in regard to Condition 7 of the officer's recommendation which is as follows:

'The on-site tree/s to be retained (as marked in red on the approved plans) shall be maintained in perpetuity, to the ongoing satisfaction of the City.'

This condition is imposed when existing trees on-site are being retained. However, with this development application no trees are being retained on-site and instead a 2m x 2m tree planting area is proposed in the front setback area of the site. Therefore, the following condition should' have been imposed:

'Prior to the initial occupation of the development, the on-site tree (as marked in red on the approved plans) shall be planted and maintained thereafter in perpetuity, to the ongoing satisfaction of the City.'

An officer amendment to condition 7 of the officer's recommendation has been circulated.

The interpretation that the significant height restriction is at the front of the building facing Fraser Road, does this height have to be stepped down to the natural ground level throughout the entire structure?

The interpretation regarding the significant height restriction is at the front of site facing Fraser Road is due to the design principle P6 within Clause 5.1.6 'Building Height' of the R-Codes relating to ensuring building height proposed maintains 'access to views of significance' of adjoining properties. There is a significant slope from south to north on the subject site whereby there is a fall of some 7 to 8 metres across the site. The height of the proposed single house increases progressively northward into the site, and while it is still necessary that this be considered and assessed against the relevant deemed to comply Building Height requirements, does not have an impact on the views of significance of adjoining properties from its eastern and western elevations in comparison to the front whereby due to the natural topography in this location, the height at the front of the development is the location whereby access to views of significance of properties to the south of Fraser Road may be effected. As outlined within the Council Report, the access to views of significance from Nos. 1, 3 & 5A Fraser Road is maintained. Therefore, the height of the dwelling does not need to be stepped down as the height proposed has been assessed to satisfy the relevant design principles of the R-Codes in relation to building height.

In addition to the questions at the ABF, there have been a number of questions raised regarding unauthorised fill on the subject site. In 2015, the City commenced compliance action with regard to fill which had been placed on site at 4 Fraser Road without approval. In January 2016, a development application was received (DA-2016-1). In response to correspondence from the City which indicated that it was unlikely to support the fill in its current form, the owner engaged a contractor to remove some of the soil and reduce the height. These modifications ensured the fill met the deemed to comply provisions of Community Planning Scheme No.5 and the R-Codes and on 4 May 2016, the City wrote to the landowners to state the DA had been withdrawn on this basis.

As indicated in the unauthorised fill section of the report to Council at Item UP22/3994, the current application has been assessed based on the natural ground levels which existed prior to the fill being placed on site. This assessment includes Water Corporation mapping and a cross check with a site plan from a 2003 subdivision application.

A review of the file indicates the City sent the complainants a letter in March 2016 acknowledging their concerns and confirming the applicants had been advised to cease any work until relevant approvals were obtained.

Copies of the submissions

Copies of each of the submissions received in relation to the proposed development are available to the Elected Members via the portal - [Submissions 4 Fraser Road, Applecross](#).

4 STEP ASSEMENT – 4 FRASER ROAD, APPLECROSS

In assessing the impact of views from the proposed three storey single house with roof terrace at No. 4 Fraser Road, Applecross, the City has adopted the four (4) step assessment for view sharing established in *Warden vs Town of Mosman Park* and in other legal cases around Australia, which requires four steps be undertaken to evaluate the impacts of a proposal on views from surrounding properties. In this assessment, the City of Melville considers the properties to the south of the subject site at Nos. 1, 3 and 5A Fraser Road, Applecross to be the only properties whereby their views are compromised by the elements of building height which exceed the deemed to comply height allowed.

Views from Nos 2 & 6 Fraser Road will not have any of their views of the river or Perth Skyline affected by the proposed development as their viewing areas are from the river side and the subject development at No. 4 Fraser Road does not adjoin/affect these locations.

The steps to evaluate the impacts of a proposal on views from surrounding properties are:

1. Assess views likely to be affected using these principles:
 - Water views are valued more highly than land views.
 - Iconic views are valued more highly than views without icons.
 - Whole views are valued more highly than partial views.
2. Consider what part of the property the views are obtained from, noting that protection of views across side boundaries are more difficult than protection of views from front and rear boundaries;
3. Determine the extent of the impact for the whole property using the following principles:
 - Views from living areas are more significant than from bedrooms or services areas.
 - Loss of views to be quantified as being negligible, minor, moderate, severe or devastating.
4. Assess the reasonableness of the proposal that is causing the impact noting that a moderate impact as a result of non-compliance with planning controls may be considered unreasonable.

As part of legal advice obtained by the City regarding assessment of impact of views, the following principles/steps were identified which were ultimately adopted by the SAT in the *Warden* case:

- Assess what is the existing access to views of significance, unaffected by the proposed development?
- Assess whether it is appropriate that access to views of significance be maintained in the circumstances of the case; and
- If it is appropriate that access to views be maintained, then does the proposed development maintain access to views of significance?

With the first step, the following principles are relevant:

- (1) Whole views are more significant than partial views.
- (2) Iconic views, water views and views of where water meets land are more significant than land views and views without icons.
- (3) The view from front or rear boundaries are more significant than views from side boundaries.
- (4) Standing views are more significant than seated views.
- (5) Views from living areas are more significant than views from bedrooms/service areas.
- (6) Views from kitchens are also highly valued.

The table below provides an analysis of each view, in terms of the property, the location, the habitable areas and the impact rating in order to assess the access to existing views as per the legal advice. A comment is then provide in terms of the appropriateness of maintaining the view and whether it is maintained.

Impact on No.1 Fraser Road

Using the above process, 3D images and associated cross section views/sight line analysis have been provided by the applicant to demonstrate the impact of the proposed development on the views available from No.1 Fraser Road, which is located to the southeast of the subject site.

The views available that are potentially affected due to the building height exceeding the deemed to comply requirement at No. 4 Fraser Road have been assessed as follows when compared to the approved plans issued as part of the development approval for the current single house at No. 1 Fraser Road (DA-2006-301):

Property	3D Image co-ordinate/location	Habitable area	Does it block views?	Impact rating
1 Fraser Road	Upper Floor	Bedroom 1/Juliet Balcony	Views of the river and Perth skyline will not be affected as the proposed development is not within this view corridor. A view towards the north/north west may be partially obscured by the proposal however this is a secondary view and glimpses will remain over the other adjoining properties.	Negligible.
	Upper Floor	Balcony	No. Views of the river and Perth skyline facing north, and northeast will not be affected as the proposed development is not within this view corridor.	N/A

Impact on No.3 Fraser Road

Using the above process, 3D images and associated cross section views/sight line analysis have been provided by the applicant to demonstrate the impact of the proposed development on the views available from No.3 Fraser Road, which is located to the south of the subject site.

The views available that are affected due to the building height exceeding the deemed to comply requirement at No. 4 Fraser Road have been assessed as follows when compared to the current development on-site at No. 3 Fraser Road. No copies of approved development applications or building permits could be found so an assessment has been done based on undertaking a site visit and a desktop assessment to identify what rooms and subsequent views do currently exist:



Property	3D Image co-ordinate/location	Habitable area	Does it block views?	Impact rating
3 Fraser Road	Ground Floor	Balcony	<p>Yes.</p> <p>North facing views of the river in the direction of Matilda Bay from the ground floor balcony would be obscured by the proposed development. However, a compliant two storey house would obscure this view as the balcony on 3 Fraser Road is at a similar level to the proposed first floor of 4 Fraser Road.</p> <p>The views northeast facing the river and Perth skyline will not be affected as the proposed development is not within this view corridor. This is key view which remain unaffected by this proposal.</p>	Moderate
	Ground Floor	Outdoor Living Area associated with Pool	Yes. Refer notes above.	Moderate
	First Floor	Balcony	<p>Yes.</p> <p>North facing views from the balcony to the river will be slightly</p>	Negligible



Property	3D Image co-ordinate/location	Habitable area	Does it block views?	Impact rating
			<p>obscured due to the balcony (No.3 Fraser Road) and proposed roof terrace at No.4 Fraser Road having similar relative levels (RL)'s.</p> <p>The applicant has provided cross sections identifying that No.3 Fraser Road Finished Floor Level (FFL) is RL15.540m & No 4 Fraser Road at the top of front feature wall is an RL16.131m. The information provided by the applicant indicates the long view towards the Matilda Bay foreshore will remain largely unaffected.</p> <p>The views northeast facing of the river and Perth skyline will not be affected as the proposed development is not within this view corridor. This is key view which remain unaffected by this proposal.</p>	

Impact on No.5A Fraser Road

Using the above process, 3D images and associated cross section views/sight line analysis have been provided by the applicant to demonstrate the impact of the proposed development on the views available from No.5A Fraser Road, which is located to the southwest of the subject site.

The views available that are affected due to the building height exceeding the deemed to comply requirement at No. 4 Fraser Road have been assessed as follows when compared to the approved plans issued as part of the development approval for the current single house at No. 5A Fraser Road (DA-2006-1488):

Property	3D Image co-ordinate/location	Habitable area	Does it block views?	Impact rating
5A Fraser Road	Ground Floor	Verandah and family	<p>Yes.</p> <p>This property has access to views towards the north west, the north and the north east. The views to the north west are unimpeded by this development.</p> <p>The north facing views from the verandah towards Matilda Bay are obtained directly over No. 6 Fraser Road and this view is not impacted by the current proposal.</p> <p>The views from this verandah to the northeast of Perth's skyline and river will be partially obscured by the proposal. This is due to the finished floor level of the</p>	Minor



Property	3D Image co-ordinate/location	Habitable area	Does it block views?	Impact rating
			verandah at No.5A Fraser Road being lower than the maximum height proposed for 4 Fraser Road. This view would be obscured by a building which meets the deemed to comply height provisions.	
	Ground Floor	Lounge	No. Only has north and north west facing views which occur directly over No. 6 Fraser Road or the street towards Dalkeith and Nedlands .	N/A
	First Floor	Balcony, Master Bedroom and Bed 2	No. Views to the north, north west and northeast will not be obscured by the proposed development due to the balcony at No.5A having a FFL 2m higher than the feature wall at No.4 Fraser Road.	N/A

Summary

No. 1 Fraser Road

As noted above in the table, the primary views will not be obstructed by the proposed single house at No.4 Fraser Road, due to the orientation of major openings at No.1 Fraser Road facing northeast which provides unobstructed views of the Swan River and Perth Skyline.

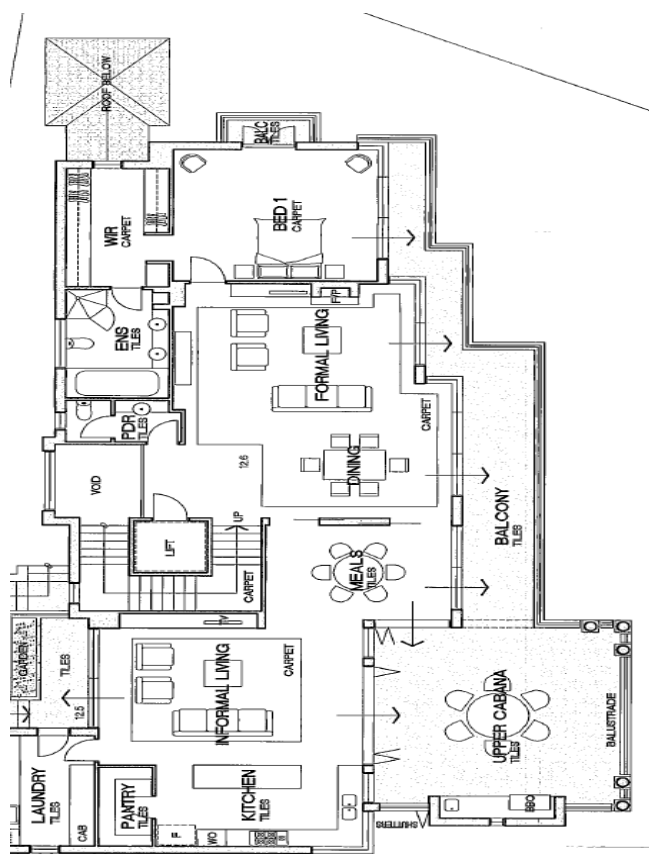


Figure 1: Approved Upper Floor Plan from DA-2006-301 issued for 1 Fraser Road. North is to top of image, east is to the right of image.

No. 3 Fraser Road

As noted above in the table, views directly to the north will be partially obstructed from the ground and first floor habitable spaces because of the subject development. It is appropriate to obscure the view from the ground floor as this would be impacted by a deemed to comply proposal. The partial impact at the upper floor is also considered appropriate as the long view toward Matilda Bay is maintained.

However, the proposed development does still ensure that access to views of significance are maintained and not affected by the proposed development to the northeast of the Perth skyline and Swan River. The view of the Perth skyline and the Swan River are determined as being significant and worth protection. These are currently whole views and are being maintained as such.

The overall impact the proposal has on views available from No. 3 Fraser Road is minor. In accordance with the 'view sharing test' used in the *Warden v Town of Mosman Park* case this is considered reasonable.



Figure 2: Site Photo Showing Ground Floor & Upper Floor Balconies at No.3 Fraser Road

No. 5A Fraser Road

As noted above in the table, views directly north will not be obstructed by the proposed development due to orientation.

Views from the ground floor balcony to the northeast towards Perth's skyline (an iconic view) will be partially obscured due to the finished floor level of the balcony at No.5A Fraser Road being lower than the maximum height proposed for No.4 Fraser Road.

However, the proposed development does still ensure that access to views of significance from the first-floor balcony are maintained to the northeast to the Perth skyline and Swan River are not affected by the subject development.

The overall impact the proposal has on views available from No. 5A Fraser Road is negligible. In accordance with the 'view sharing test' where the overall impacts are negligible because of a proposal that is non-compliant with a planning control, the impacts can be considered as reasonable.

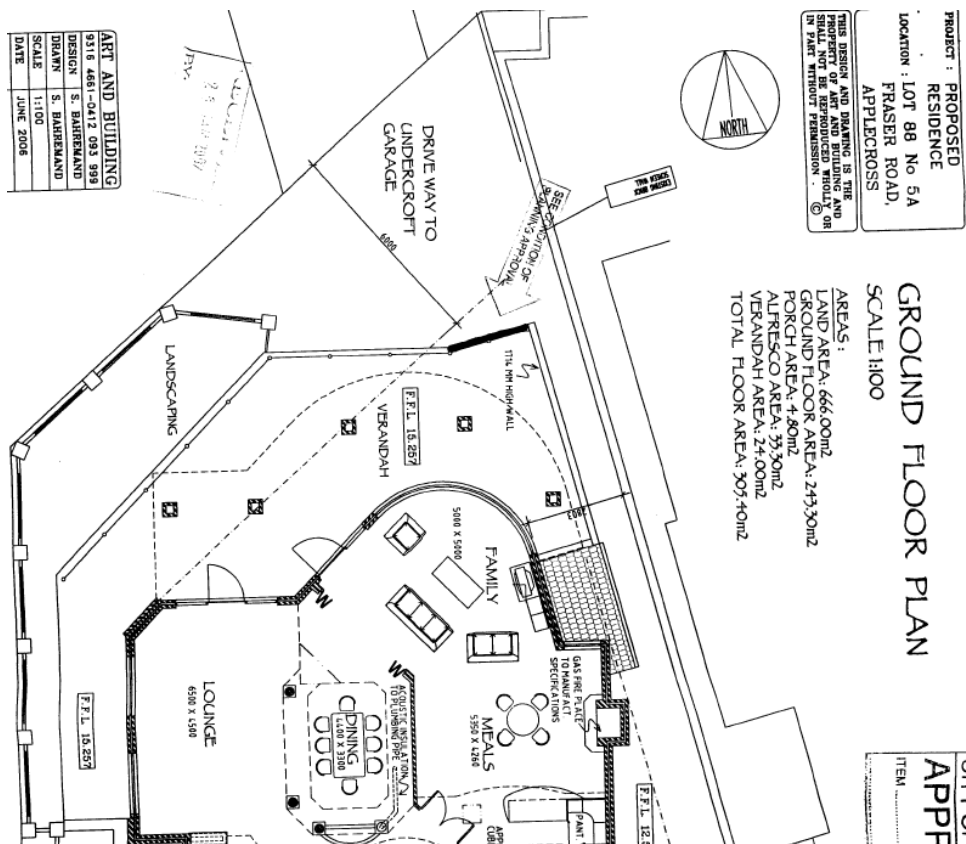


Figure 3: Approved Ground Floor Plan from DA-2006-1488 issued for 5A Fraser Road. Top of image facing north.

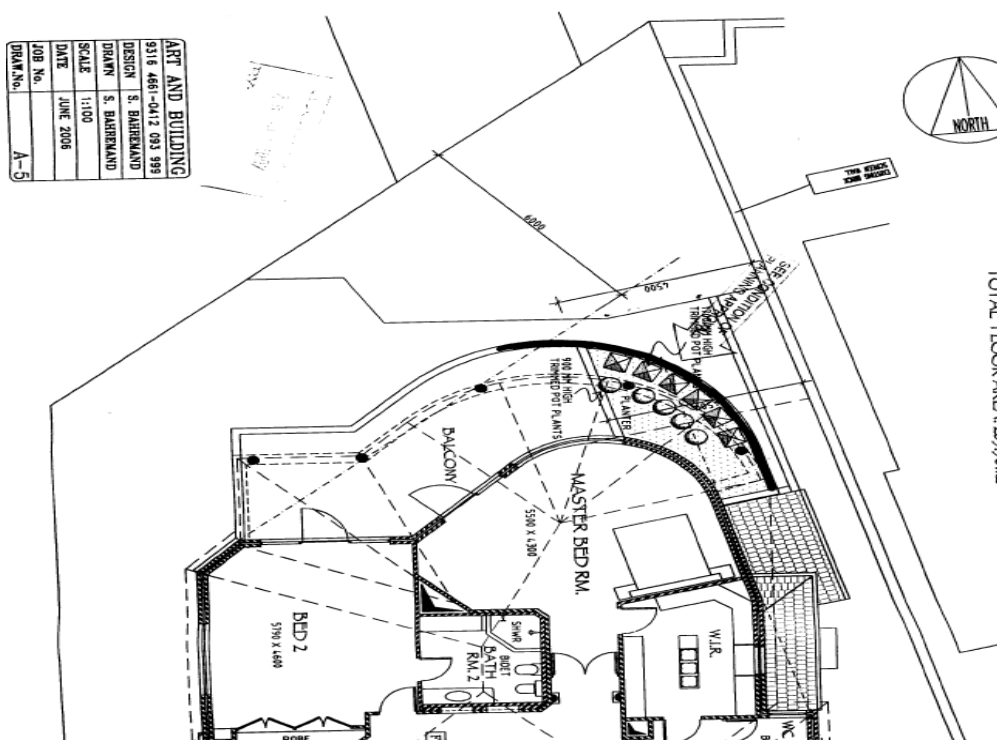


Figure 3: Approved First Floor Plan from DA-2006-1488 issued for 5A Fraser Road